IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.3697 OF 2006

Surendra Jainarayan Kapur ...Applicant

Versus

The State of Maharashtra & Ors. ...Respondents

Ms J.B.Joil for the Applicant.
Shri S.V.More, A.P.P for the State.

CORAM : A. S. OKA, J.

DATE : DECEMBER 11, 2006.

P.C.:

1. Heard the Advocate for the Applicant. In a complaint filed by the Applicant under section 138 of the Negotiable Instruments Act, 1881, the learned Trial Judge has acquitted the second Respondent. The acquittal is on two grounds. The first ground is that the alleged money claim of the Applicant against the second Respondent was barred by limitation on the date on which the cheque was allegedly issued by the second Respondent. The second ground is that there was no legally enforceable liability.

2. The learned Advocate for the Applicant submitted that in view of a decision of the Kerala High Court in case of Dr.K.K.Ramakrishnan Vs. Dr. K.K.Parthsaradhy and Another (2004 Company Cases Page

457), the complaint could not have been dismissed on the ground that the amount claimed by the applicant was barred by law of limitation. She submitted that a clear case was made out by the Applicant in his deposition that the cheque was issued for discharge of a legally enforceable liability and therefore, presumption under section 139 of the Negotiable Instruments Act, 1881 will apply.

3. I have considered the submissions. In the notice of demand issued under section 138(b) of the said Act of 1881, the Advocate for the Applicant has stated thus:

> ". You had invited to my client Shri S.Kapur having his office at 3, Union Co-op.Ins.Bldg. 3rd Floor, Sir P.M.Road, Mumbai-400 001 **to share Hill Park Flat No.35 & 36 situated at Malabar Hill, Mumbai-400 006 on equal basis.Therefore, the substantial investment was made by my client in the venture. In addition you had also borrowed personally some funds and as a security you had issued a Cheque bearing No."596256" 400022010 dated 20th March, 2004, drawn on Oriental Bank of Commerce Nepean Sea Road,**

> **Mumbai- 400 036 and amounting to Rs.10,00,000/- (Rupees Ten Lakhs Only). This was to cover any contingencies and by way of security for my clients investments**. The said cheque was in the name of "M/s.Sudeep Constructions Pvt.Ltd." which was issued to my client as security". (Emphasis supplied)

4. In his affidavit of examination-in-chief, the Applicant stated thus:

> "I had read the content of the complaint those are true and correct, complaints bear my signature and I identify my signature. I know the accused since last ten years. The Accused is the businessman residing at Naru Harmony, Plot No.D-2, La Citadel Colony, Opp.Cidade Goa, Dona Paula, Goa. **The Accused approached me for urgent financial help and as such as a friend we knew each other since past ten years and due to his reason I helped the accused on the condition that the Accused in lieu of the said money shall issue one cheque of Rs.10,00,000/- (Rs.Ten Lacs Only)**". (Emphasis supplied)

5. Thus, in the notice which is the basis of the complaint it alleged that the amount was paid by the Applicant to the second Respondent for the purposes of making investment in the joint venture of acquiring two flats and the cheque in dispute was issued by the second Respondent way of security. However, in the examination-in-chief, the said case was given up and a new case was made out that the second Respondent needed financial help and a friendly loan was given by the Applicant. This material aspects have been considered by the learned Trial Judge. It is obvious that the presumption under section 139 of the said Act of 1881 stands rebutted. No evidence was adduced by the Applicant as regards payment of amount by him to the second Respondent. It is well settled that for rebutting the presumption it is not necessary for the accused to step into witness box and even on the basis of preponderance of probability, the presumption can be rebutted. Therefore, the learned Judge held that the cheque was not issued towards legally enforceable liability.

6. I find that the view taken by the learned Trial Judge is a possible view which could have been taken on the basis of evidence on record. No case is made out for grant of leave. Application is rejected.

7. It is made clear that observations which are made in this order are for limited purpose of considering the prayer for grant of leave under section 378(4) of the Code of Criminal Procedure, 1973.

JUDGE